Supreme Court of the United States

BRIEF FOR PETITIONERS TO RESPONDENT'S BRIEF
IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 774

SHELL OIL COMPANY, TEXAS GAS EXPLORATION CORPORATION, J. RAY McDERMOTT & CO., INC., CALLERY PROPERTIES, INC., OCEAN DRILLING & EXPLORATION COMPANY, HUMBLE OIL & REFINING COMPANY, AMERADA PETROLEUM CORPORATION, KERR-McGEE OIL INDUSTRIES, INC., CAROLINE HUNT SANDS and LOYD B. SANDS, SOCONY MOBIL OIL COMPANY, INC., BECK OIL COMPANY, *et al.*, PHILLIPS PETROLEUM COMPANY, UNION OIL COMPANY OF CALIFORNIA, TIDEWATER OIL COMPANY, CONTINENTAL OIL COMPANY, PAN AMERICAN PETROLEUM CORPORATION, THE CALIFORNIA COMPANY, KILROY PROPERTIES, INC., *et al.*, BEL OIL CORPORATION, RICHARDSON & BASS (Louisiana Account), and MISSISSIPPI RIVER FUEL CORPORATION,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION

I.

Throughout respondent's brief runs the argument that because of *Catco* and *Transco-Seaboard* the Commission was wrong and the court below was right, no matter the difference in the records in the different cases. Respond-

ent, for instance, stresses the fact that the hearing in the remanded *Catco* case had not even begun at the conclusion of the hearing in this case and there has yet been no "evidentiary support" for the *Catco* and *Transco-Seaboard* prices. Therefore, respondent reasons, the Commission could not properly issue unconditioned certificates in this case no matter what the evidence established. The court below seems to have been influenced along that same line.*

But did *Catco* and *Transco-Seaboard* automatically call a halt to all certificate proceedings? Did those decisions strip the Commission of the power to issue unconditioned certificates even if the proof, as here, satisfies each of *Catco's* requisites? Is not each certificate proceeding to stand on its own footing and each Commission order to be judged upon the basis of the evidence in that record, supplemented (where such is the case) by those facts as to which the Commission properly takes administrative notice? Prior to final decision of Catco on remand is proof of "lowest possible reasonable rate" the only means whereby a producer applicant can obtain an unconditioned certificate for the sale of southern Louisiana gas in the price range of 21.5¢ per Mcf plus tax reimbursement?

The foregoing are representative of the type of questions which contribute to the confusion and uncertainty

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* In an attempt to water down the error of the court below that the evidence in this case was taken before *Catco*, respondent says (Br., p. 16) that the record, so far as evidence in support of the producer prices *per se* was concerned, was compiled before this Court's opinion in *Catco*. Unless respondent is laboring under the assumption that the producers had to adduce full-scale "just and reasonable" type evidence as in a § 4 or § 5 rate proceeding, its statement is not factual. At the hearing session of June 25, 1959 (3 days after *Catco*) a witness was recalled for further examination by counsel for one of the producers to establish—and it was established—that certification of these sales at the proposed prices would have no adverse financial impact upon the purchaser or its customers (R. 54-56). See also footnotes 6 and 8 of Petition herein for further evidence that *Catco* played a significant role in the type of evidence which was elicited at the hearing.

which are bound to prevail unless this Court sets them at rest. If the opinion of the court below (and the opinions of the other Courts of Appeal) "has clarified" *Catco*, as respondent contends (Br., p. 16), then it is only clarification to those who have but to say "you have not come forth with sufficient 'evidentiary support'"; it is certainly not clarification to those upon whom rests the burden of ascertaining what is sufficient "evidentiary support". The same lack of clarification, we submit, will also haunt the Commission, despite its failure to seek review of the judgment below.

In our evaluation of the record in this case, and in the Commission's evaluation of it, each of *Catco's* requisites was satisfied. Respondent, while it speaks repeatedly of "evidentiary support" of a producer certificate application, never gets to the core of the problem as to just what that "evidentiary support" should be under *Catco*, and neither did the court below, unless by its "lowest possible reasonable rate" language it felt that *Catco's* requirements could not be met unless producers proved, via a just and reasonable rate type hearing, that their proposed initial prices were in the public convenience and necessity. And we submit that only by such reasoning could the Court of Appeals have concluded that the Commission's order was not supported by substantial evidence.

II.

Despite the fervor with which respondent sets about to perpetuate the uncertainty and confusion attendant the proof requirements in the vast number of producer certificate proceedings pending and to come before the Commission, it does not deny, and cannot deny:

(a) That the questions presented in our petition are of utmost importance in a highly active phase of the administration of the Natural Gas Act and that the decision of the court below will have far reaching impact in a

matter of vital concern to the public and the natural gas industry.

(b) That the producers' initial prices involved here are not out of line with previously permanently certificated prices for southern Louisiana gas, a great many of which such prices are firm and final, including, when properly trended, prices dating back to 1954 and 1955.*

(c) That the instant purchases by Hope will not result in a triggering of general price rises, nor establish a new price plateau in southern Louisiana, nor result in an increase of any of the producers' other prices, nor result in an increase of Hope's existing rates by reason of favored nation clauses or otherwise.

(d) That Hope and its customers have an urgent need for this gas, and that Hope acquired this gas at a better bargain than other pipelines had made and were making for gas in the general area.

(e) That there are inconsistencies in the construction which the four Courts of Appeals have placed on *Catco*. Respondent acknowledges that "there is a difference in language" among the courts. (Br., p. 19). Respondent would have it that the several circuits used different language merely to create effect with words rather than to

* Respondent attempts to brush aside these 1954 and 1955 prices of 20¢ per Mcf, exclusive of tax reimbursement, on the alleged ground that they are not typical and were considered but rejected by this Court in *Catco* because mention was made of them in some of the briefs. We deny that these prices were not typical. For comparable gas they established a going value in the area. It may be true that in its order in *Catco* the Commission did not rely on these earlier sales in fixing a "line", as the "line" criterion was not then announced. To what extent, if any, reference to earlier prices made for the first time in briefs filed with this Court in *Catco* and in *Transco-Seaboard* can be deemed a rejection of those earlier prices by this Court is a matter as to which the Court would, of course, be better advised than we or the respondent. It does not appear to us, however, that the fact that the Court was apprised in briefs of those earlier prices should preclude the Commission from using them, trended, in ascertaining alignment of later prices such as those involved here.

convey meaning with them. Since the use of language is the only medium by which courts express their views, we cannot visualize how the different approaches taken by the several Courts of Appeal could have been evidenced other than by the use of different language.

III.

Respondent will not come to grips with the Court of Appeals' finding of *Catco's* "tenor" as requiring proof of "lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." Nor does respondent deny that "lowest possible reasonable rate" cannot be ascertained without a full-scale just and reasonable rate hearing. All respondent says, in effect, is that the court below did not mean what it said (Br., p. 19). But such a positive pronouncement by the court cannot be so lightly cast aside, especially when it appears to have already been taken up by the Fifth Circuit as supporting just the opposite of what respondent would have it mean (See Pet. herein, p. 60).

Respondent says that the Commission is apparently no longer in doubt of *Catco's* meaning as it does not seek review of any of the judgments of the Courts of Appeal. Aside from the fact that in one breath respondent denies to the Commission the ability to read and understand the single opinion in *Catco*, and in the next it attributes to the Commission the wisdom to knit into an orderly pattern of procedure the divergent views concerning *Catco's* tenor as expressed in five different opinions, the disturbing fact—and one which emphasizes the need for review by this Court—is the manner in which the Commission will try to piece together the views of the various circuits, with the possibility that the Commission may read the decision below as requiring a full-fledged just and reasonable rate hearing in every certificate proceeding. If that comes to pass, a breakdown in the certificating procedure is inevitable. Even if the Commission does not so construe the judgment below, the interim uncertainty

and confusion will have far reaching impact upon the industry and the gas consuming public with the net result that ultimately the same question (*i.e.*, just what does *Catco* mean) will again be at the door of this Court.

IV.

Respondent seeks to weave a web of suspicion around and thus create a false impression as to the arrangement pursuant to which Hope purchased this gas, with the view we suppose of creating the erroneous atmosphere that these purchases will result in an increase of Hope's rates to its customers. But no such result can or will flow from these purchases by Hope (see Pet. herein, p. 6 and fn. 5).

Respondent asserts that the cost of this gas to the Consolidated System is some 7¢ more than the System's "existing average cost of southwestern-produced, pipeline-purchased gas, taken at the very same delivery point." (Br., p. 5). The assertion may mislead the Court into believing that all of the gas which the System purchases from other pipelines at a weighted average cost of 37½¢ per Mcf is delivered to the System's companies *at the same delivery point as the instant gas will be delivered to those same companies. That, however, is not the fact.*

It is true that the System purchases gas from pipelines and that for the year 1960 the weighted average cost of such purchases was estimated at 37½¢ per Mcf. But a substantial part of such gas is delivered to the System, particularly to Hope, at delivery points farther removed from market than the delivery points at which the instant gas will be delivered to companies in the System. Therefore, there must be added the additional costs incurred for handling and further transporting such gas. When such costs are added to the cost of gas purchased by Hope, the total costs approximate the amounts indicated in Hope's rate schedules which were on file at the date of the hearing. Those are from 3¢ to 5¢ per Mcf higher

than Hope's cost of the instant gas at the same delivery points.

We therefore reiterate what this record establishes (R. 54-56), and what is the fact, namely, that the certification of these sales at the proposed prices will not and cannot adversely affect Hope's rates to its customers (see Pet. herein, p. 6 and fn. 5).

V.

Similar to the court below, respondent will not face the facts in this record, but rather attempts to equate this record to *Catco*. The records simply do not equate. Our petition at pages 1-8 and 22, sets forth the ample evidence upon which the Commission based its findings.

Respondent's position, as that of the court below, proceeds on the premise that *Catco* and *Transco-Seaboard* forever barred the Commission from using for price comparison purposes certificated prices (whether or not firm and final), including prices certificated prior to the Commission's Catco order.* If that be so, which we deny,

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* Respondent attempts to create the impression that the Commission's *Catco* order of June 24, 1957 gave rise to base prices in southern Louisiana in the 21¢-22¢ range. The court below appears to have been under that same impression. But the facts do not justify any such inference. In its Opinion No. 325, *In the Matter of South Georgia Natural Gas Co., et al.*, 22 F.P.C. 211, issued August 7, 1959, the Commission said:

> "• • • the facts disclose that Southern had contracted to pay the same price, [21.5¢ per Mcf, plus tax reimbursement] for certain sales of gas in South Louisiana *prior to the Commission's original certification of the Catco sale*, and that this is not the highest price Southern is paying for gas in these same general areas nor does it set a new high price for purchases by Southern."

And also:

> "In fact, in this case there is evidence that Southern had contracted to pay 21.5 cents [plus tax reimbursement] in south Louisiana *prior to the original certification of the Catco price, in fields having no relation either in time or geographically to the Catco offshore sale.*"

the effect would preclude the Commission from ever ascertaining alignment of prices. It would force every certificate proceeding into a full-scale just and reasonable rate hearing. Moreover, it would deprive the Commission from ever prescribing a standard by which to judge proposed prices in the light of *Catco's* teachings; a standard which the Commission adopted in this case and which respondent feels is acceptable to other areas but not to southern Louisiana (Br. in Opp., p. 21, fn. 18).

Respondent, in our view, gives entirely too much effect to this Court's *per curiam* in *Transco-Seaboard*, as did the court below. But as with *Catco*, only this Court can authoritatively settle that question. Unlike respondent, we construe *Transco-Seaboard* as authority only for the proposition that it was for the Commission, not the Court of Appeals, to pass initially upon the evidence in the light of *Catco*, to ascertain whether it was in the public convenience and necessity to issue unconditioned certificates.

CONCLUSION

For the reasons herein and in the petition for certiorari, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

April, 1961

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